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SHALINI KANAGARATNAM v. PUSAT PERUBATAN UNIVERSITI MALAYA & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-02-2017-09-2013]
12 MAY 2016

C ***TORT:*** *Negligence – Medical negligence – Duty of care – Standard of care – Doctrine of res ipsa loquitur – Whether maxim applied in medical negligence cases*

The plaintiff ('appellant') sued the defendants ('respondents') for general, aggravated, exemplary and special damages for medical negligence and/or neglect of professional duty in the diagnosis and treatment given to her. The
D High Court dismissed the appellant's claim on the grounds that she had failed to prove a case against the respondents for negligence on a balance of probabilities. Thus, the appellant appealed. The appellant, amongst others, as damage control to the omission to prove her case, asserted her entitlement to rely on the doctrine of *res ipsa loquitur* which the appellant contended, would shift the evidential burden to negate negligence on the respondents.
E However, the appellant was not able to produce any authority on point to assist the court in determining whether the doctrine of *res ipsa loquitur* applied in medical negligence cases.

Held (dismissing appeal with no order as to costs)
F **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) It is well-established that (i) the doctrine of *res ipsa loquitur* is not a rule of law but rule of evidence; (ii) the mere happening of an accident is not, in general, *prima facie* evidence of negligence on the part of the respondents which caused the accident; and (iii) the circumstances of the
G accident may raise sufficient presumption of negligence. (para 7)

(2) In cases of professional negligence and/or medical negligence, the appellant has to prove that there was: (i) duty of care; (ii) breach of standard of care; (iii) breach of duty of care; and (iv) the breach caused the damages. Therefore, the appellant had to lead evidence to show that
H the standard of care had been breached. The doctrine of *res ipsa loquitur* will not ordinarily apply as the appellant will have to discharge the legal burden. Only after the legal burden has been discharged, the respondents have to satisfy that the legal duty was not breached. (para 9)

(3) The appellant had purportedly tendered a favourable report given by a
I doctor who was not called as a witness. On the contrary, the respondents have provided evidence to show that the standard of care principle was not breached. The trial judge had accepted the respondents' version as

well as evidence. The trial judge's approach was correct on methodology as well as jurisprudence. In the circumstances, the appellant had not proved, as per the pleaded case, the particulars of negligence as well as the standard of care. (para 12)

(4) The instant case is one of finding of facts. It is abundantly clear that the appellant had not proved the case according to law. The appellant attempting to rely on the principles on *res ipsa loquitur* in medical negligence without citing authorities stands as a 'misconceived submission' and if the argument is given judicial recognition, the jurisprudence relating to medical negligence will be placed in the same footing as road traffic accident cases, demolishing well-established cases relating to 'standard of care' and proof thereof. (para 14)

Bahasa Malaysia *Headnotes*

Plaintif ('perayu') memulakan tindakan terhadap defendan-defendan ('responden-responden') untuk ganti rugi am, teruk, teladan dan khas berikutan kecuaian perubatan dan/atau pengabaian tugas profesional dalam diagnosis dan rawatan yang diberikan kepada plaintif. Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa dia gagal membuktikan kesnya terhadap responden-responden untuk kecuaian atas imbangan kebarangkalian. Oleh itu, perayu merayu. Perayu, antara lain, sebagai langkah memperbaiki kegagalan membuktikan kesnya, menegaskan haknya untuk bergantung kepada doktrin *res ipsa loquitur* yang dihujahkan akan mengalihkan beban keterangan untuk menafikan kecuaian kepada responden. Walau bagaimanapun, perayu gagal mengemukakan apa-apa autoriti untuk membantu mahkamah menentukan sama ada doktrin *res ipsa loquitur* boleh diguna pakai dalam kes-kes kecuaian perubatan.

Diputuskan (menolak rayuan tanpa perintah kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Adalah menjadi pengetahuan umum bahawa (i) *res ipsa loquitur* bukanlah peraturan undang-undang tetapi kaedah keterangan; (ii) kejadian kemalangan semata-mata bukannya, secara umum, keterangan *prima facie* kecuaian pada pihak responden-responden yang menyebabkan kemalangan; dan (iii) hal keadaan kemalangan tersebut mungkin membangkitkan anggapan kecuaian yang mencukupi.

(2) Dalam kes-kes kecuaian profesional dan/atau kecuaian perubatan, perayu perlu membuktikan bahawa terdapatnya: (i) tanggungjawab berjaga-jaga; (ii) pelanggaran standard berjaga-jaga; (iii) pelanggaran tugas berjaga-jaga; dan (iv) pelanggaran tersebut menyebabkan kerugian. Oleh itu, perayu harus mengemukakan keterangan untuk menunjukkan terdapatnya pelanggaran standard berjaga-jaga. Doktrin *res ipsa loquitur* tidak akan secara biasa diguna pakai kerana perayu harus melangsaikan

beban undang-undang. Hanya selepas beban undang-undang dilangsaikan, responden-responden harus memuaskan bahawa tanggungjawab undang-undang tidak dilanggar.

(3) Perayu kononnya mengemukakan laporan yang memihak kepadanya yang diberikan oleh seorang doktor yang tidak dipanggil sebagai saksi. Sebaliknya, pihak responden mengemukakan keterangan yang menunjukkan bahawa prinsip standard berjaga-jaga tidak dilanggar. Hakim bicara menerima versi responden-responden dan juga keterangannya. Pendekatan hakim bicara adalah betul dari segi kaedah dan perundangan. Dalam keadaan ini, perayu gagal membuktikan seperti yang diplidkan butir-butir kecuaian serta standard berjaga-jaga.

(4) Kes ini adalah bersandarkan dapatan fakta. Adalah jelas bahawa perayu tidak membuktikan kesnya mengikut undang-undang. Cubaan perayu untuk bergantung kepada prinsip *res ipsa loquitur* dalam kecuaian perubatan tanpa memetik autoriti adalah satu 'hujahan terpesong' dan jika hujahan tersebut diberikan pengiktirafan kehakiman, maka perundangan berkaitan kecuaian perubatan akan ditempatkan di kedudukan yang sama seperti kes kemalangan jalan raya, dengan merobohkan kes mantap berkaitan standard berjaga-jaga dan pembuktiannya.

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118; [1957] 1 WLR 582 ***(refd)***

Bolitho v. City And Hackney Health Authority [1997] 3 WLR 1151 ***(refd)***

Dato' Dr V Thuraisingam & Anor v. Sanmarkan Ganapathy & Anor [2015] 8 CLJ 248 CA ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor [2013] 1 LNS 1447 HC ***(refd)***

For the appellant - R Kamalanathan & Vinod R Kamalanathan; M/s Vinod Kamalanathan & Assocs

For the 1st respondent - Fahri Azzat & Aisya Abdul Rahman; M/s Azzat & Izzat

For the 2nd respondent - T Sagadevan & K Navinderan; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor [2013] 1 LNS 1447 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant appeals against the decision of the learned High Court Judge who dismissed the claim for medical negligence, *inter alia* on the grounds that the appellant/plaintiff had failed to prove the case on a balance of probabilities against the respondents/defendants.

[2] After having perused the notes of evidence, what was glaringly obvious in the instant case was that the appellant has not proved her case according to law as advocated in medical negligence cases. (See *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118; [1957] 1 WLR 582; *Bolitho v. City And Hackney Health Authority* [1997] 3 WLR 1151; *Dato' Dr V Thuraisingam & Anor v. Sanmarkan Ganapathy & Anor* [2015] 8 CLJ 248; *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 FC).

[3] Learned counsel for the appellant, as damage control to the omission to prove the case according to law in medical negligence cases, asserted that they are entitled to rely on the doctrine of *res ipsa loquitur*, which the appellant says will shift the evidential burden to negate negligence on the respondents.

[4] When we queried whether the doctrine of *res ipsa loquitur* will apply to medical negligence cases, *when the plaintiff is alleging specific instances of negligence as in the instant case, learned counsel was not able to produce any authority on point to assist the court* (emphasis added).

[5] The memorandum of appeal of the appellant reads as follows:

1. (a) The Learned Judge erred both in law and in fact when she failed to appreciate that whilst the burden of proof always remained with the Appellant to prove her case, yet the evidential burden had shifted to the Respondents in this case.

   (b) The Learned Judge failed to appreciate that whilst it was the Respondents' case all along that the Appellant suffered from immature teratoma and that the Respondents relied on the reports of the pathologists, endocrinologists and the radiologists to make the said diagnosis, but the Learned Judge erred in law in failing to hold that the reports of the pathologists, endocrinologists and the radiologists were marked as ID and not admitted into evidence and that these witnesses were never called to testify, and in the circumstances the Respondents had failed to rebut the evidential burden that had shifted to them to support their diagnosis of immature teratoma.

2. (a) The Learned Judge erred in law and in fact when she held in her judgment that the Appellant had "strenuously objected" to additional witnesses being called by the Respondents after all parties were directed by the Court during case management to file their respective list of witnesses, when the Learned Judge overlooked her own ruling which she made after hearing submissions from all parties, that no additional witnesses would be allowed to testify since the Respondents had chosen not to include them as witnesses in the 1st Defendant's list of witnesses.

   (b) Therefore having led the Appellant to believe that all the relevant documents relied on by the Respondents remained as ID and therefore not subject to cross examination, the Learned Judge erred in law when she overruled her own decision and admitted the

documents marked as ID as admissible documents without giving the Appellant the right to cross-examine the makers of the said documents.

(c) By allowing the documents marked as ID to become exhibits without the Appellant being allowed to cross-examine the makers of the said documents the Appellant has suffered a breach of natural justice which warrants judicial interference by an Appellate Court.

3. (a) The Learned Judge erred in law and in fact when she held that PW1 ie Dr. Lavarajah was not an oncologist nor an expert on cancer when it was made plain from the outset that the said doctor was only called to interpret Gribbles's report that there were no cancer cells present in the Appellant.

(b) The Learned Judge erred in law and in fact when she held that Dr. Lavarajah had admitted that there was an indication for ovarian cancer when he was referred by the 2nd Respondent to exhibits IDD 25 and 26 (RR J8 pg 1502-1503), when the Learned Judge ought to have rejected such evidence because until the close of the case for the Defence the said documents IDD 25 and 26 remained as IDD.

(c) The Learned Judge therefore erred in concluding that Dr. Lavarajah's evidence was unfavourable to the Appellant when the documents referred to were never proven for its contents by the endocrinologist.

4. When Counsel for the 1st Defendant informed the Court that the Appellant's pleadings were different from the allegations contained in the witness statement and when the Court having enquired if the 1st Defendant had applied for further and better particulars and when informed that the 1st Defendant had applied for further and better particulars and that the same was dismissed by the High Court and that the 1st Defendant did not appeal against the said decision, yet the Learned Judge held in her decision that the Appellant's evidence differed from its pleadings.

5. (a) The Learned Judge relied on the radiology reports (pages 1493, 1515, 1516 RR J8) to accept that the 2nd Respondents was not negligent even though the 2nd Respondent was of the view that the Appellant needed total hysterectomy when these documents were clearly marked as IDD 20, 31 and 32 as set out in the chronology of events marked as item 44.

(b) The Learned Judge also relied on pages 1523 to 1525 of RRJ8 being the pathologist's report but again this report was marked as IDD 37 and the pathologist was never called for cross examination.

6. The Learned Judge erred in law when she rejected the Appellant's evidence that she was admitted for emotional problems to the psychiatric ward not because of the chemo treatment nor because of the surgery but because of what she overheard that she did not have cancer but was being given cancer treatment.

7. The Learned Judge erred in law and in fact when she failed to consider the submission that the consent obtained by the Respondents for the operation failed the test of decided authorities.

8. (a) The Learned Judge erred in law and in fact when she accepted the testimony of the Respondents' specialist namely D1 i.e. Dr Goh the neurologist when the said specialist admitted that his evidence was based on IDD 24 which was only marked as ID.

(b) The Learned Judge erred in giving weight to the specialist's evidence because when the Appellant cross-examined him, he agreed with the Appellant and when the 1st Respondent re-examined him, he agreed with the 1st Respondent and that in the circumstances, the Learned Judge ought not to have relied on his evidence.

9. The Learned Judge erred in law and in fact in giving due weight to the evidence of the Respondent's psychiatrist DW2 i.e. Dr Jambunathan when the witness was discredited under cross-examination and when he found fault with his own junior's treatment of the Appellant.

10. The Learned Judge totally erred in law and in fact when she failed to appreciate that in an attempt to produce the original copies of document put in Bundles E and F, the 1st Respondent called to Court DW 3 the Penolong Tadbir University Malaya who confirmed under cross-examination that the contents of Bundle E were not the originals and as for Bundle F, he could not say if they were the originals.

11.(a) The Learned Judge erred in law and in fact when she accepted the evidence of DW4, the 2nd Respondent that he diagnosed the Appellant as having immature teratoma and that his diagnosis was based on the radiologist's report, on his clinical assessment as well as the tumor markers.

(b) The Learned Judge erred when she failed to appreciate that although pointed out in the submission that later in his evidence the 2nd Respondent agreed that reliance on clinical assessment is not conclusive and further the Learned Judge ought not to have accepted reliance on the radiologist's report and the tumor markers because to the very end the radiologist's report and the tumor markers remained marked as IDD. (page 1686).

(c) The Learned Judge erred in law and in fact when she failed to make a finding that there was no basis for the 2nd Respondent to remove the left ovary of the Appellant when there was no proven evidence of cancer since the pathologist's report was only marked as IDD 24 and the pathologist was not called and there was no evidence led to support cancer and further the alleged verbal conversation between the 2nd Respondent and the pathologist whilst the 2nd Respondent was in the operating room confirming that the Appellant had ovarian cancer, ought to have been rejected as hearsay, since the pathologist was not called to confirm the said conversation.

(d) Therefore based on these the Learned Judge ought to have held that there was no evidence that the Appellant suffered from ovarian cancer and ought to have held that the Appellant had been wrongly diagnosed by the 2nd Respondent.

(e) The Learned Judge erred in law and in fact when she failed to consider in her judgment that whilst in his report marked as exhibit D41, the 2nd Respondent had made reference to relying on ultrasound examination and the CT Scan and that he had based his report on these, but these were never in evidence as the pathologist and radiologist were not called to testify.

12. The Learned Judge erred in law and in fact when she accepted in her judgment the pathologist's report by referring to it when the said report was only marked as IDD 24 and the pathologist was never called to testify.

13. The Learned Judge erred in law and in fact when she accepted the evidence of the 2nd Respondent that the Appellant needed a total hysterectomy and which advice was based on inadmissible evidence since neither the pathologist nor the radiologist whose reports the 2nd Respondent said he relied on, did not attend Court to tender their reports.

14. The Learned Judge did not consider at all the various instances of negligence of the 2nd Respondent based on his own admission when he said:

(a) That instead of doing a laparotomy, laparoscopic examination could have been done by a laparoscopic surgeon who was available in the hospital.

(b) That by failing to give the Appellant the choice to call for a laparoscopic surgeon, the 2nd Respondent had breached the requirement set in the decision of the Federal Court in *Foo Fio Na*.

(c) That the 2nd Respondent concluded it was a malignant tumor based on the pathologist's tele-conversation with him, when the pathologist was not called and therefore there was no evidence to show malignant tumor.

(d) That the 2nd Defendant assumed it was grade 3C cancer (later to read grade 3(A)) when there was no evidence to support the same.

(e) That the 2nd Respondent admitted that he based his clinical findings of immature teratoma on the pathology report marked as IDD 24 and which remained as ID and therefore there was no basis for his findings.

(f) That the report relating to the 2006 episode was also contained in Bundle F and which report was marked as IDD 28 and remained as ID to the end and therefore there was no evidence to support the decision for a total hysterectomy.

(g) That the 2nd Respondent had failed to record anywhere that the Appellant was suffering from immature teratoma.

(h) That the 2nd Respondent admitted in evidence that "when the pathologist told us that it was a malignant tumor we are dealing with, then we removed the omentum", but the pathologist was never called and the 2nd Respondent finally admitted that the pathologist did not say so and the pathologist's report marked as IDD 24 remained unproven.

(i) That on re-examination by his Counsel, the 2nd Respondent admitted that without the pathologist's report, he would not know whether there was any immature tumor.

(j) The 2nd Respondent advised a total hysterectomy based on the CT Scan findings but the CT scan findings were never admitted into evidence and remained as ID.

DW 5 - Prof Dr. Illancharan (Gynecologist)

15.(a) The Learned Judge erred in law and in fact when she accepted the evidence of the 2nd Respondent's expert Prof Dr. Illancharan (DW 5) in spite of his admission that his report was not based on his own investigation and the examination of the original records, (page 1656) and he admitted that he relied on IDD 20 which was not admitted in evidence and he also agreed that he could have sought for an independent radiologist's report instead of relying on what was sent to him.

(b) The Learned Judge erred in law and in fact when she failed to accept the admission of DW 5 who confirmed that even for grading purposes of the cancer, one had to look at the pathology report and insofar as this case is concerned there was no pathology report admitted, (page 1659) and the Learned Judge erred in failing to appreciate this witness's admission that a pathologist was needed for clarification, (page 1660).

(c) The Learned Judge again erred in law and in fact when she failed to appreciate and accept the evidence of DW 5 that only the pathologist could tell as to whether the Appellant had cancer or whether initially she never had cancer.

(d) Based on this evidence itself and also on the fact that the pathologist, the haematologist, the endocrinologist nor the radiologist attended Court, the Learned Judge erred in law when she failed to appreciate that the evidential burden of proof had shifted to the Respondents to proof that the Appellant had cancer, (page 1661).

16. In re-examination the 2nd Respondent had contended that the Appellant had gone into remission which meant that the disease was not present at the moment but there was always a chance of it coming again when this issue was never pleaded nor raised by either of the Respondents in their evidence and the Learned Judge ought not to have allowed this evidence in, which influenced her decision to dismiss the action.

17. The Learned Judge failed to hold that since DW 5 had admitted under cross-examination that he had written 2 reports one in 2008 and the 2nd in 2013, and that he had only produced the 2nd report to Court, and that on this admission the Learned Judge ought to have drawn an adverse inference for failing to produce the 1st report.

18.(a) The Learned Judge erred when she failed to accept the evidence of DW 5 who said that the surgeon would not be able to see with his naked eye any indication that it is immature teratoma and that it had to be confirmed by the pathologist and even the grading must be done by a pathologist and the Learned Judge further erred when in her grounds of judgment she accepted the 2nd Respondent's evidence that he could identify with his naked eye, without giving any reasons as to why she accepted the 2nd Respondent's version as opposed to that of the expert.

(b) In failing to consider all these admissions by this witness, the Learned High Court Judge erred in failing to evaluate the totality of the evidence before her by accepting the evidence favourable to the Respondents and disregarded evidence favourable to the Appellant.

DW6 - Dr. Joginder Singh (Consultant Radiologist)

19. The Learned Judge erred in law and in fact in accepting the evidence of this witness as an expert radiologist when his entire evidence on his own admission, was based on documents marked as ID 48 - 51 and these documents were never proven nor marked as exhibits and in the circumstances all evidence based on documents marked as ID ought to have been rejected by the Learned Judge.

DW7 - Dr. Prasantha Kumar Dass (Consultant Pathologist from Penang)

20.(a) The Learned Judge erred in law and in fact in accepting the evidence of this witness as an expert pathologist when his entire evidence on his own admission is based on documents marked as ID 54 (No. 1 - 45) and these slides were never proven nor marked as exhibits and in the circumstances all evidence based on documents marked as ID ought to have been rejected by the Learned Judge.

(b) The Learned Judge ought to have rejected the evidence of this witness when he admitted that he was not given the original slides but was given duplicates and his further admission that he would not know whether the duplicates that were sent to him by the Respondents' solicitors were from the original block of specimen.

(c) The Learned Judge erred in law and in fact when no reasonable explanation was given by the Respondents as to why they refused to call their own pathologist who was involved in the investigations but rather called as witness, a pathologist who had nothing to do with the initial reading.

(d) In the circumstances the Learned Judge erred in law when she accepted and relied on the evidence of this witness when all the 3 expert's evidence were clearly shown to be unacceptable on the admission of the experts themselves since they relied on documents only marked as ID.

21. The Learned Judge erred in law and in fact when she accepted the 2nd Respondent's explanation and his findings with regard to the 2006 episode when she ought to have rejected his evidence as his entire evidence was based on the pathologist's report marked as IDD 37 (pages 1523 - 134) and there was therefore no basis for him to contend that the immature teratoma had recurred and consequently therefore the Learned Judge erred in law and in fact in giving the Appellant 3 cycles of chemo.

22.(a) The Learned Judge erred in law and in fact when she relied on the decision in *Whitehouse v. Jordan* [1980] 1 All ER 650 because the reason why the Court stated the quotation reproduced by the Learned Judge at para 25 of her judgment was because the Court found that there was virtually a fixing up of the medical reports between the Plaintiff's experts and their Counsel and the Learned Judge therefore failed to consider the Appellant's submission on this very same issue.

(b) The Learned Judge again erred in law and in fact when she relied on *Whitehouse v. Jordan* and held that an error of clinical judgment by a medical practitioner did not of itself amount to negligence when she failed to state in her judgment that she had considered the submission of the Appellant on this issue and then had rejected it and therefore there was clearly a misdirection by the Learned Judge in failing to evaluate the totality of the evidence.

(c) If the Learned Judge had considered the submission of the Appellant on this issue, she would have accepted the fact that in *Whitehouse v. Jordan* the so called error in judgment was whether the doctor pulled too hard using the forceps or not whereas in the case before her ladyship the issue was not a matter of clinical judgment, but that the 2nd Respondent had wrongly diagnosed the Plaintiff as having cancer, when there was no admissible evidence for his diagnosis as all documents to support such a diagnosis were only marked as ID and not exhibits.

23. The Learned Judge erred in law when she relied on the decision of *Bolitho v. City and Hackney H.A.* [1988] AC 233 for the wrong reason because the decision in *Bolitho* put a heavier burden on the 2nd Respondent because it held that "the exponents of the body of opinion supporting the 2nd Respondent's conduct of the case must satisfy the Court that such opinion has a logical basis" when in our case the 2nd Respondent's specialist merely relied on inadmissible documents to arrive at their conclusions.

24. The Learned Judge erred in law and in fact when she held that the Appellant's claim ought to be dismissed because the Appellant failed to call experts to support her case when the Learned Judge failed

to appreciate that the Appellant can prove her case by relying on the cross-examination of the Respondents and their witnesses and on medical journals.

25. The Learned Judge erred in law and in fact when she held that the Appellant had failed to prove that there was a duty of care by the Respondents towards the Appellant and that the Appellant had failed to prove causation, when both these issues were submitted in full to the Learned Judge and she failed to consider the Appellant's submission and failed to give reasons why she rejected the Appellant's submission on these issues.

26.(a) The Learned Judge erred in law and in fact when she held that the Appellant could not rely on the article from Wikipedia nor solely on the 2 Defendant's evidence to discharge the burden of proving damages.

(b) The Learned Judge failed to appreciate that if the Respondents were found negligent then it means that the Appellant was wrongly diagnosed for cancer and given treatment for cancer unnecessarily and that she had her body parts removed unnecessarily.

(c) The Learned Judge also erred in law and in fact when she failed to consider or even refer the submission of the Appellant where under heading general damages the Appellant adopted the classification of the injuries as set by the 2nd Respondent in his submission but only disagreed on the quantum of damages and therefore the Learned Judge clearly erred when she held that the Appellant had "not adduced any evidence to show what her losses specifically were".

(d) The Learned Judge also erred in law when she failed to assess damages as she ought to have done even if she had dismissed the claim.

27. When Counsel for the 1st Respondent informed the Court that the Appellant's witness statement contained far less than what was contained in the Statement of Claim, the Learned Judge herself questioned Counsel if he had applied for Further And Better Particulars and when Counsel informed the Learned Judge that he did so and that his request for Further And Better Particulars was denied and that even his appeal to the Court of Appeal was dismissed, and having therefore gone on record to say that it was therefore the onus of the 1st Respondent to have obtained the particulars, the Learned Judge must have overlooked the above conclusion when she erroneously held that the Appellant's pleadings are entirely different from her evidence.

Brief Facts

[6] The argument before us was only in relation to the legal burden. As we are satisfied that the appellant has not discharged the legal burden, we do not intend to set out the facts and the reason why the learned judge had dismissed the appellant's claim. The learned judge had written a judgment

consisting 51 pages, setting out the facts, law and the grounds in detail. It is a speaking judgment and this judgment must be read together with the said judgment. The judgment is reported as *Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor* [2013] 1 LNS 1447.

Jurisprudence Relating To *Res Ipsa Loquitur*, Negligence And Medical Negligence

[7] It is well-established that (i) the doctrine of *res ipsa loquitur* is not a rule of law but rule of evidence; (ii) the mere happening of an accident is not, in general, *prima facie* evidence of negligence on the part of the defendant which caused the accident; (ii) the circumstances of the accident may raise sufficient presumption of negligence.

[8] In ordinary negligence case, it will be sufficient for the plaintiff if he proves three elements: (i) there was duty of care on the part of the defendant; (ii) that duty was breached; (iii) the breach caused damages. The doctrine of *res ipsa loquitur* may assist the plaintiff to shift the burden on the defendant to establish that he was not negligent. Most road traffic accident cases will carry the plea of *res ipsa loquitur* in the statement of claim and if the defendant does not give evidence or there is no evidence to rebut negligence, the court will find the defendant liable.

[9] In cases of professional negligence and/or medical negligence, the plaintiff has to prove four elements. They are (i) duty of care; (ii) breach of standard of care; (iii) breach of duty of care; and (iv) caused damages. In consequence, the plaintiff has to lead evidence to show the standard of care has been breached. The doctrine of *res ipsa loquitur* will not ordinarily apply as the plaintiff will have to discharge the legal burden and only after the legal burden has been discharged, the defendant has to satisfy that legal duty was not breached.

[10] It is also well-established in medical negligence cases that the plaintiff must establish the appropriate standard of care and demonstrate that the standard of care has been breached, with expert evidence. The trial courts observation on this issue reads as follows:

> The court was satisfied that the plaintiff had failed to discharge her burden of proving her claim on a balance of probability.
>
> My reasons are as follows:
>
> (1) The plaintiff failed to call Dr. Nithya Ramamurthy from Malar Hospital whose very opinion is the thrust of her pleaded claim (see para 11-12, p 57, Bundle A).
>
> (2) The plaintiff's only witness other than herself and her father was PW1, who, by the plaintiff's own submission, merely interpreted a recent cancer market report which showed that the plaintiff currently no longer has cancer.

A (3) No other expert evidence has been adduced by the plaintiff in support of her claim that she did not have cancer in 2000 and 2006.

(3) More importantly, no evidence was led during the trial or sought during the discovery stage of the proceedings to prove any of her pleaded allegations of negligence against the 1st and 2nd defendants.

B

[11] In ordinary negligence case, 'standard of care' will not be in issue. However, in 'professional negligence' case, the burden is placed on the plaintiff to establish the 'standard of care' has been breached. Learned author Bullen and Leake and Jacobs on *Precedents and Pleadings*, 28th edn, have C separated the precedents and pleadings for negligence and professional negligence to make out the distinction. In *Dato' Dr V Thuraisingam & Anor v. Sanmarkan Ganapathy & Anor* [2015] 8 CLJ 248, Hamid Sultan Abu Backer JCA sitting with Badariah Sahamid JCA and Prasad Sandosham Abraham JCA had *inter alia* held:

D (2) The threshold for the plaintiffs to succeed is high in contrast to ordinary negligence cases. However, even though the threshold is high for the plaintiff, once duty of care as well as standard of care has been breached and it is established against the doctor, case laws have placed the evidential burden on the doctor to rebut the plaintiffs' allegation when such allegation is supported by expert E evidence to say the doctor has not satisfied the standard of care, expected of his professional standing.

...

(7) It was a grave misdirection on the part of the trial judge to disregard F the medical expert opinion on the subject in issue to deal with 'standard of care' in particular relating to medical negligence, in breach of established guidelines set out in *Bolam*, *Bolitho*, as well as *Foo Fio Na*'s case. In addition, it also did not subscribe to the Evidence Act 1950. The trial judge single-handedly attempting to deal with the issue of 'standard of care' without weighing all the G medical experts evidence undermined the integrity of the decision making process requiring the appellate court giving no other alternative but to quash the decision *in limine*.

[12] In the instant case, the appellant had purportedly tendered a favourable report given by a doctor from India who was not called as a H witness. On the contrary, the defendants have provided evidence to show that the standard of care principle was not breached. The learned trial judge had accepted the defendants' version as well as evidence. We find that the learned judge's approach was correct on methodology as well as jurisprudence. The appellants have not proved as per the pleaded case the particulars of negligence as well as the standard of care which was summarised by the I second respondent as follows:

(a) Failed to ensure without any reasonable doubt whether the Appellant in fact had an ovarian cyst which the 2nd Defendant has categorised as "malignant tumor" before carrying out the surgery;

(b) Failed to exercise appropriate medical skill and expertise or give treatment appropriate to the Appellant's condition at the time of preliminary diagnostic medical test and observation immediately when the Appellant was admitted to the 1st Respondent's (1st Defendant's) hospital in year 2000, whether the Appellant in fact had ovarian cyst which the 2nd Respondent categorised as "malignant tumor" before deciding to do the surgery;

(c) Failed to provide appropriate treatment to the Appellant or to ensure whether the Appellant's ovary could be treated with medication until well if the 2nd Respondent found the Appellant's ovary was not well.

(d) Failed to make an early accurate and correct diagnosis whether the Appellant's ovary in fact suffered or nearly suffered malignant tumor.

(e) Carrying out a breach of honesty and good faith and wilful neglect of professional medical conduct and breaching the duty of care when lading to diagnose the Appellant's condition in detail and carefully which has resulted in the Appellant's medical condition of being unable to bear now child for the rest of her life.

(f) Failed to take any precautionary steps or cautious management and avoid and/or evade any possibility that the Appellant may not have remove the ovaries or undergo chemotherapy treatment which has now caused the Appellant's medical condition of not allowing the Appellant give birth for life.

(g) Failed to take any precautionary steps or cautious management care to avoid and/or evade any possibility that the Appellant may not have to remove the ovaries or undergo chemotherapy which had caused the Appellant to undergo violent mood swings.

[13] The second respondent had denied the allegation and had in defence stated:

(a) he had acted within the required care and skill in accordance with the accepted and standard medical practice;

(b) he acted with reasonable competency and in accordance with accepted and standard medical practice in the diagnosis, treatment and care;

(c) the diagnosis and treatment were based both on his operative findings and the histopathological and radiological findings;

(d) the Appellant's claim is barred by period of limitation pursuant to section 6 of the Limitation Act 1953.

[14] The instant case is one of finding of facts. It is abundantly clear that the appellant has not proved the case according to law. The appellant attempting to rely on the principles on *res ipsa loquitur* in medical negligence case on the facts of the instant case, without citing authorities in our view

stands as a 'misconceived submission' and if the argument is given judical recognition, the jurisprudence relating to medical negligence will be placed in the same footing as road traffic accident cases, demolishing well established cases relating to 'standard of care' and proof thereof as advocated in many cases such as *Bolam*, *Bolitho*, *Dr V Thuraisingam* and *Foo Fio Na*, etc.

[15] For reasons stated above, we dismissed the appeal with no order as to costs.

We hereby ordered so.